ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re the Matter of:

Request for Amendment of the Commission's Policies on Preferences in Comparative Broadcast Hearings.	))))	RM No. 7741

OPPOSITION TO PETITION FOR RULEMAKING

The National Association for the Advancement of Colored People (NAACP), the League of United Latin American Citizens (LULAC) and the National Black Media Coalition (NBMC) (herein, collectively, the Civil Rights Organizations), by their attorney and pursuant to § 1.405(a) of the Commission's Rules, hereby oppose the Petition for Rulemaking filed in the above proceeding by Larry G. Fuss d/b/a Contemporary Communications, Radix Broadcasting,Inc. and Howard N. Binkow & Dale A. Ganske (Petitioners). Petitioners propose to alter the comparative criteria for new broadcast facilities by adding a preference for applicants who sought allocation of the channels in contest. The Civil Rights Organizations oppose any such change in the comparative criteria because the change (1) will not serve any valid purpose, and (2) will deprive the public of service from new broadcast stations owned by minorities.

I. Petitioners' Proposal will Not Serve Any Valid Purpose.

There is no valid reason why a preference should be granted in broadcast comparative proceedings to applicants who sought allocation of the channels in contest. Such a "finders" preference would in fact violate basic tenets of communications law. The Communications Act requires the Commission to grant construction permits based on whether those grants will serve the public interest. 47 U.S.C. §§ 307(a); 309(a); 309(e). Where there are mutually exclusive applications for the same construction permit, a longstanding basic criterion applies for deciding among the applicants. The Commission must determine who among the applicants will provide "the best practicable service to the community." FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

A finders preference cannot be reconciled with these tenets. There is no conceivable basis upon which the Commission could conclude that an applicant who located a broadcast channel will provide the best practicable service to a community. Nor can the Commission reasonably conclude that the public interest would be served by a grant based on a finders preference. The relevant public interest is the public interest that will be served by grant of the construction permit. At that stage, the allocation process is history. Who found the channel in the past is irrelevant to the public interest that will be served

now by grant of the permit.[1]

There is, moreover, no reason to believe that the public interest will be served even in the allocation process by a finders preference. There is simply no need to provide additional incentives for parties to find new broadcast channels. There has never been any shortage of private parties seeking allocations of new channels. Dozens of such proposals are made by private parties every year. The channels allocated as a result of these proposals already fully occupy the Commission's adjudicatory personnel and facilities. There is no need whatever for more such proposals.

Petitioners cite two benefits that they suppose will accrue from their proposal. They argue that a finders preference create an incentive for private parties to seek more allocations for rural communities, and that it will encourage stand-alone AM stations to apply for FM facilities. Petitioners are wrong in both cases; the very opposite is true.

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[1] In this respect, Petitioners' finders preference differs from the "Pioneers" Preference established in Gen. Dckt. 90-217. There the Commission emphasized that although applicants who first propose technologically innovative services will be granted construction permits, other applicants will also be able to apply for, and receive, construction permits to provide the same service. Thus, the Commission will still grant the application of the applicant who will best serve the public interest. It will also be in a position to grant that application if it receives more applications than it can accommodate on the available frequencies. No such opportunity would exist if broadcast licensing decisions were based on a finders preference. By definition, only one channel is available. Even if an applicant other than the finder would provide better service to the public on that channel, it could still be denied the permit.

Petitioners propose a preference no matter where the finders find their new channels. Finders will have exactly the same expectation that they will be granted construction permits whether they find new channels in major markets or in rural communities. Because they will receive the same preference either way, finders will devote their efforts to locating channels in major markets. It is well known that major market stations are more profitable, and sell for greater multiples, than rural stations. Parties who spend the money to find new channels will naturally seek to maximize their returns on those expenditures. Because they will achieve a far better return from finding channels in major markets, the Commission should expect them to do precisely that.

Much the same analysis applies to stand-alone AM stations. If they are going to spend their money to locate new FM channels, they will have the same incentive as everyone else to maximize their returns. They will not do that by tying a new FM station to an AM station that is already losing money. They will maximize their returns by locating channels with the greatest potential profitability, wherever they happen to be. With a finders preference in hand, AM station owners will happily dump their AM stations.

Petitioners' preference will not have any effect on stand-alone AMs, moreover, unless the Commission were to give the new preference even greater weight in comparative proceedings than its diversity criterion. That criterion is

currently given the greatest weight of all criteria. Assuming that the diversity criterion will outweigh the finders preference, owners of AM stand-alone stations will lose on diversity alone, especially if their AM stations are in the same communities as the new FM channels. Owners of the AM stations can avoid that result by promising to dispose of their AM stations, but if they promise to do that, what benefit does the finders preference provide to stand-alone AM stations? It benefits the former owners of those stations. It does not benefit the stations themselves.

II. A Finders Preference will Deprive the Public of Service by Minorities.

The Commission has repeatedly recognized the public interest importance of minority ownership in broadcasting. E.g. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980-81 (1978); Waters Broadcasting Corp., 91 FCC 2d 1260, 1265 (1982). This recognition has recently been confirmed by the Supreme Court. Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990). Yet minority ownership of broadcast stations remains today at only about three percent. There is a vital public interest in increasing this percentage. A greater proportion of minority ownership will give the public access to minority perspectives, of which they may be deprived by the present lack of minority owned stations. Such a greater distribution of minority perspectives to all people is an important step to ending the economic and

social vestiges of discrimination that persist today.

The small amount of broadcast spectrum that remains unoccupied today is perhaps the most effective means available to the Commission to increase minority ownership of broadcast stations. Minorities in the aggregate still suffer the adverse economic consequences of discrimination. Thus, as a group they lack the means to purchase broadcast stations in any proportion even close to their representation in the population. Vacant broadcast spectrum represents an opportunity--long enjoyed by the white majority, but only recently available to minorities--to participate in broadcasting at the ground floor. With a construction permit for a new station, a minority licensee can sign on the air for only the cost of constructing the station.

A finders preference would seriously erode this opportunity to bring minorities into broadcasting. For the same reasons minorities as a group lack the means to purchase a proportionate number of broadcast stations, they lack the means to locate a proportionate number of new broadcast channels. As Petitioners themselves recognize, finding new broadcast channels entails substantial expense. Minorities are less able to meet that expense. If the Commission gives a comparative preference to applicants simply because they have the resources to find new channels, the Commission will, to exactly the same extent, reduce the opportunity for minorities to obtain new broadcast licenses.

Sound public policy cries out against such a result.[2]

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For the foregoing reasons The Civil Rights Organizations urge the Commission to deny Petitioners' Petition for Rulemaking.

Respectfully submitted,

The National Association for the Advancement of Colored People

The League of United Latin American Citizens

and

The National Black Media Coalition

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[2] On September 18, 1990, the Civil Rights Organizations filed a Petition for Rulemaking aimed at improving the opportunity for minority ownership of broadcast media. Although the Petition and accompanying comments in MM Docket No. 90-263 and Gen. Docket No. 90-264 have been pending for more than a year, nearly all of the proposals therein have yet to be assigned an "RM" number as required by Section 1.403 of the Rules. The "Finders Preference" petition, which would significantly dilute minority ownership opportunities, was filed May 16, 1991; it was assigned an "RM" number and put on public notice on June 24, 1991. If the Commission is seeking public comment on alternatives to the current broadcast comparative criteria, it should place all relevant alternatives before the public.

CERTIFICATE OF SERVICE

I, Michael J. Hirrel, hereby certify that I have, this 24th day of July, 1991, caused to be served the foregoing "Opposition to Petition for Rulemaking" to the following party of record by depositing a copy thereof in the United States Mail, first class postage prepaid, and addressed as follows:

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